No. 89 - 1520

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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COOK INLET TRIBAL COUNCIL,
C.A.A. AND C.M.F.,
A TRIBAL INDIAN MOTHER
AND HER MINOR CHILD
PETITIONERS,

V.

CATHOLIC SOCIAL SERVICES, INC.,
C.G. AND S.G.
RESPONDENTS.

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PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

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# BRIEF AMICI CURIAE OF THE TANANA IRA NATIVE COUNCIL; QUINAULT INDIAN NATION; (additional amici on inside cover)

IN SUPPORT OF PETITIONER

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April 1990

**AMICI**

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION;

THE KARUK TRIBE OF CALIFORNIA;

ROHNERVILLE BEAR VALLEY WIYOT RANCHERIA OF CALIFORNIA

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## INTEREST OF THE AMICI CURIAE

Amici curiae are federally recognized Indian tribes from the State of Alaska and other states. Amici have substantial interests in preventing their state courts from following the precedent established by the Alaska Supreme Court in this case. Alaska tribal amici have a particular interest in the resolution of the issues before this Court since the decision of the Alaska Supreme Court has an immediate and adverse impact upon those tribes' rights under the Indian Child Welfare Act (hereinafter the ICWA or the Act).

The Alaska Supreme Court decision at once denies tribes the right to intervene and the right to notice in voluntary proceedings. This holding is patently inconsistent with the plain language of the ICWA which grants Indian tribes the express right to intervene in any state court proceeding resulting in the termination of parental rights to an

Indian child, whether or not the parent has consented to the termination. And although the ICWA does not expressly grant tribes the right to receive notice of voluntary termination proceedings, that right is, by force of due process principles, a concomitant right to the right to intervene in voluntary proceedings.

Furthermore, the decision below creates a loophole in the ICWA which significantly undermines the Act's purposes. The decision will allow those determined to avoid tribal participation in voluntary termination proceedings to shop for a state forum where tribal intervention and notice to tribes is not required. This practice defeats a uniform application of the ICWA and frustrates the efforts of states who implement the Act by providing for tribal intervention and notice in both voluntary and involuntary proceedings.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD REVIEW THE DECISION BELOW TO CORRECT THE ALASKA SUPREME COURT'S MISCONSTRUCTION OF THE PLAIN LANGUAGE OF THE INDIAN CHILD WELFARE ACT.

#### A. The Alaska Supreme Court Erred in Holding That Indian Tribes Do Not Have a Right of Intervention in Voluntary Termination Proceedings.

In the case at bar, Catholic Social Services, Inc. v. C.A.A., 783 P.2d 1159, 1160 (Alaska 1989), the Alaska Supreme Court found that "Congress explicitly granted intervention rights to tribes in involuntary termination proceedings but did not do so in voluntary termination proceedings." This finding of no right to intervene in voluntary termination proceedings is a glaring misconstruction of the plain language of the Indian Child Welfare Act. Based on this erroneous construction, the Alaska court further held that the Tribe had no right to notice in voluntary proceedings. This Court should accept review of the decision below in order to correct this blatant error.

The ICWA provides in pertinent part that, "[i]n any State court proceeding for the . . . termination of parental rights to, an Indian child . . . the Indian child's tribe shall have the right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c) (emphasis added). The Act defines "termination of parental rights" to mean "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903 (1)(ii). Thus, by its plain language, the Act grants tribes the right to intervene in any proceeding for the termination of parental rights, whether voluntary or involuntary in nature.[1]

In the instant case, the trial court agreed with this construction of the Act's terms and set aside the Indian mother's voluntary relinquishment of her parental rights, which had resulted in a "termination

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[1] There is no language in the Act which restricts the Tribe's right to intervene solely to involuntary proceedings.

of the parent-child relationship", for failure to provide notice to the Tribe.[2] However, the Alaska Supreme Court rejected the trial court's finding and, having erroneously concluded that the Tribe had no right to intervene, the Court further determined that the Tribe was not entitled to notice in voluntary proceedings. Catholic Social Services, 783 P.2d at 1160.[3] The

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[2]This Brief adopts and incorporates the Petitioners' Petition for a Writ of Certiorari. The facts referred to herein are set forth in the Statement of the Case, Pet. Brief at 2-8.

[3] The provision in the Bureau of Indian Affairs' interpretive guidelines, relied upon by the Alaska Supreme Court, does not support the court's decision that there is no right to intervene in voluntary proceedings. The BIA provision merely paraphrases the language of the Act which mandates both intervention and notice in involuntary proceedings. That provision is not inconsistent with the position that the ICWA grants to tribes the right to intervene in voluntary as well as involuntary proceedings.

Whether the Alaska Supreme Court would have held that notice is required if it had properly construed the ICWA to grant the right to intervene in voluntary proceedings is unknown. Interestingly, however, the Alaska Supreme Court has recognized that the interests of grandparents in the ICWA'S

per curium opinion never discussed or even cited to § 1911(c) of the Act which explicitly provides for intervention by the Tribe in any proceeding.

Moreover, the Alaska Supreme Court's decision significantly frustrates the purposes of the ICWA, which was enacted to remedy the devastating impact on tribes of the massive removal of their children and subsequent placement into non-Indian homes. See H.R. Rep. No. 1386, 95th Cong., 2d Sess. reprinted in 1978 U.S. Code Cong. & Admin. News 7530-31 (hereinafter House Report). The Act is intended to ensure a tribal role in all Indian child custody proceedings for the purpose of promoting "the stability and

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placement preference give rise to due process protection. E.A. v. State, 523 P.2d 1210, 1215 (Alaska 1981). And in that case, the court held that "[i]n order that the grandparents may effectively assert their statutory right to preference at [adoptive] proceedings, we further hold that they have a due process right to notice and an opportunity to be heard . . . . " Id. at 1215-1216.

security of Indian tribes and families . . . . " 25 U.S.C. § 1902. This purpose is severely undermined by the Alaska Supreme Court's decision because it denies tribes the right to intervene in voluntary termination proceedings. This decision is clearly inconsistent with both the language of the Act and its congressional intent.

Indeed, this Court has recognized that Congress intended the ICWA to "reach voluntary as well as involuntary removal of Indian children . . . ." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. ____, 108 S.Ct. 1597, 104 L.Ed.2d 29, 48 n. 25 (1989) (hereinafter Holyfield). The Court in Holyfield also acknowledged that the substantive provisions of the Act were not restricted to involuntary removal of Indian children, but also extend "in cases where the parents consented to an adoption, because of the concerns going beyond the wishes of

individual parents." Id. at 47 - 48 (emphasis added).[4]

If there is any doubt whether the ICWA grants tribes the right to intervene in voluntary proceedings, the Act should be liberally construed to effect Congress's intent to promote the stability and security of Indian tribes and families. Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976). Furthermore, as this Court has found, federal laws dealing specifically with Indian affairs are liberally construed in favor of preserving Indian rights. Choctaw Nation v. United States, 318 U.S. 423, 431-31 (1943). These principles of statutory construction mandate interpreting the ICWA to grant tribes the right to intervene in voluntary termiantion proceedings.

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[4]The substantive provisions are listed in Holyfield and include the Tribe's right to intervene. Id.

## B. The Tribe's Right to Intervene to Protect the Tribal Membership of its Children is an Interest Entitled to Due Process Protections Including the Right to Notice.

### 1. The Tribe's right to intervene is an interest protected by the Due Process Clause.

The Tribe's right to intervene in state proceedings involving their children is protected by principles of due process. As this Court stated in Board of Regents v. Roth, 408 U.S. 564, 569 (1972): "The requirements of the procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[5] In Roth the Supreme Court set out the test for identifying a protected property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement

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[5]U.S. Const. Amend. XIV § 1 declares: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

> to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U.S. at 577. As discussed below, the Tribe's interest in protecting its tribal membership and, in particular, the membership interests of its children, meets the Roth test and therefore is entitled to treatment as a property interest protected by constitutional due process.

This Court has long and consistently recognized that one of an Indian tribe's most basic rights is its authority as a "distinct, independent political communit[y]", "to define its own membership for tribal purposes." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 32 (1978). Accord United States v. Wheeler, 435 U.S. 313, 327 n. 18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906). It is undeniable that tribes rely upon their children for their vitality and for their continued ability to exist as

distinct political communities. As Congress recognized in enacting the ICWA, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." § 1901(3). As this Court has further recognized, one of the fundamental purposes of the ICWA is to strengthen and expand tribes' power to protect this critical interest:

> The protection of [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents . . . .

Holyfield, 104 L.Ed.2d at 49, citing In re Adoption of Halloway, 732 P.2d 962, 969-970 (1986) (emphasis added). Hence, the ICWA empowers tribes to assert their interests in their children in state forums on a parity with the natural parents.

This Court previously has established that the parent-child relationship is entitled to due process protection. In

Santosky v. Kramer, 455 U.S. 745 (1982), the Court expressly resolved that "state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." Id. at 753, citing Lassiter v. Department of Social Services, 1452 U.S. 18, 37 (1981). See also Stanley v. Illinois, 405 U.S. 645, 651 (1972), quoting May v. Anderson, 345 U.S. 528, 533 (1953) (The right to raise one's children is "far more precious . . . than property rights.") (emphasis added).

Since the ICWA recognizes that the Tribe's interest in protecting the tribal-child relationship is "on a parity" with the parental interest in protecting the parent-child relationship, the tribal interest, like the parental interest, is entitled to due

process protection.[6] As we discuss next, the right to notice, under principles of due process, is a concomitant right to the tribal right to intervene in voluntary termination proceedings, notwithstanding the lack of express language in the ICWA granting a right to notice in such proceedings.

### 2. Notice is required under Due Process principles to protect essential Tribal interests.

In order for tribes effectively to assert their statutory rights to intervene to protect their interests in the membership of children, tribes must be afforded the due process right to notice and an opportunity to be heard.

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[6]The Tribe's interest in asserting its rights under the ICWA is as important as other interests this Court has recognized as protectable property interests. Some of these recognized protected property interests include continued welfare benefits, Goldberg v. Kelley, 397 U.S 254 (1970); unemployment compensation, Sherbert v. Verner, 374 U.S 398 (1963); and school attendance, Gross v. Lopez, 419 U.S. 565 (1975).

This Court has determined that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted). Notice is particularly important in effectuating the tribal right to intervene in ICWA proceedings in state forums because of the inherent antagonism between tribes and states in the area of social services. The legislative history of the ICWA demonstrates Congress's appreciation of this situation and notes that "the conflict between Indian and non-Indian social systems operates to defeat due process." House Report at 7535.

In ICWA cases, due process principles safeguard both the parental and the tribal

interests against arbitrary deprivation. Therefore, if the Act's intervention provision is to have any meaning at all, the concomitant right to notice should be applied to protect the tribal interests in both voluntary and involuntary proceedings under the ICWA.

Moreover, the burden of such a notice requirement is minimal compared to the serious risk of depriving the Tribe an opportunity to participate in a fair hearing. All that is required is that a simple letter be mailed to the child's tribe. Certainly, these procedures do not place an undue burden on the state to comply with due process.[7]

## II. THE ALASKA DECISION THREATENS A UNIFORM APPLICATION OF THE INDIAN CHILD WELFARE ACT.

In the Holyfield decision, this Court repeatedly noted the importance of a uniform

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[7]Currently, several states require notice in voluntary as well as involuntary proceedings. See discussion infra at p.17-18.

application of the ICWA. 104 L.Ed.2d 43-46 ("[F]ederal statutes are generally intended to have a uniform nationwide application . . . ."). The Holyfield case involved a tribal member's attempt to circumvent the ICWA by deliberately choosing a state forum that construed the Act's domicile provisions such that the Act would not apply to the tribal member's situation. In rejecting the notion that states are free to interpret the ICWA's domicile provisions differently, the Court sought to eliminate a loophole that would have allowed individuals to evade the precepts of the ICWA merely by transporting their children across jurisdictional lines. As this Court reasoned:

> [T]ribal jurisdiction under [the Act] was not meant to be defeated by the actions of individual members of the tribe for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.

Id. at 47.

In the instant case, the Alaska decision creates a similar threat to a uniform application of the ICWA. Under the Alaska precedent, a social services agency or an Indian parent, whose child is subject to the ICWA, could avoid the reach of the Act by transporting the child to a jurisdiction which does not require notice to tribes in voluntary proceedings. In that instance, a termination of parental rights or an adoption could take place without the tribe even knowing of it. Such a result is clearly contrary to the purposes of the Act of promoting extensive tribal participation in all phases of ICWA proceedings.

Unlike Alaska, several states have either enacted statutes requiring notice to tribes of voluntary Indian child custody proceedings or have construed the ICWA to require such notice. For example, the Minnesota Indian Family Preservation Act requires that, "[w]hen an Indian child is

voluntarily placed in foster care, the local service agency involved in the decision to place the child shall give notice of the placement to the child's parents, tribal social service agency, and the Indian custodian within seven days of placement." Minn. Stat. § 257.353 (1989). See also Mich. Court Rules 5.980 (A)(2) (1989); Wash. Rev. Code § 26.33.09 (2) (1989). The State of Idaho has an Indian Child Welfare Agreement with the Coeur d'Alene Tribe which specifically requires that the Tribe receive "complete information" of all child custody proceedings.

Thus, as in Holyfield, there is a dire need for the Court to ensure a uniform application of the ICWA's intervention and notice provisions.

## CONCLUSION

In light of the Alaska Supreme Court's misconstruction of the plain language of the ICWA and its resulting denial of the due process right of notice to tribes of voluntary termination proceedings, and in light of the need for a uniform application of the ICWA, this Court should grant the petition for certiorari and reverse the Alaska Supreme Court's decision.

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